DAMANSARA DEVELOPMENTS SDN. BHD.

v.

LEONG CHOOI YEE

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CIVIL APPEAL NO. 40 OF 1982]
24 FEBRUARY 1984

LANDLORD AND TENANT: *Original tenancy agreement - Whether replaced by new agreement - Termination of tenancy - Whether accepted by landlord.*

Syarikat Seng Teik ("the Syarikat") of which the defendant was the sole proprietor, occupied a space ("the premises") on the second floor of Wisma Damansara belonging to the plaintiff. Earlier on the Syarikat occupied a space on the ground floor of Wisma Damansara, and it wished to move to the second floor. The plaintiff agreed, subject to certain conditions and "subject to contract". The defendant moved into the premises. She however wrote a letter on 6 August 1977 of termination of the tenancy with immediate effect. She vacated the premises in April 1978, returning the keys of the premises on 9 April 1978. The keys were accepted by the plaintiff. The premises were subsequently occupied by others. The plaintiff brought an action, alleging premature termination of the tenancy with the Syarikat and claiming arrears of rent, damages and service charges for the period from July 1977 to July 1978. The President of the Sessions Court held that there was no binding contract between the parties. The plaintiff appealed.

Held:

[1] There was tenancy for a period of three years. The subsequent conduct of the defendant showed that there was a contract on the terms proposed by the plaintiff. The occupation of the premises by the Syarikat was unequivocally referable to the written contract alleged by the plaintiff. The conduct of the defendant was an implied acceptance of a tenancy for three years. There was no evidence of any breakdown in negotiations.

[2] The tenancy was not terminated on 6 August 1977.

[3] It was however terminated on 9 April 1978. The plaintiff's acceptance of the keys of the premises on 9 April 1978 implied that it had accepted termination as from that date. The subsequent conduct of the plaintiff confirmed this finding.

[4] Arrears of rent and service charges were therefore recoverable only for the period up to 8 April 1978.

[5] There was no duty on the plaintiff to mitigate damages by renting the premises to a new tenant until the keys to the premises were returned, although the premises had been vacated earlier.

[Appeal allowed.]

For the appellant/plaintiff - T. Thomas; M/s. Skrine & Co.
For the respondent/defendant - Ong; M/s. Lim Kean Siew & Yazid Baba

JUDGMENT

Wan Hamzah J:

Syarikat Seng Teik (hereafter referred to as the Syarikat) of which the defendant was the sole proprietor, occupied a space (hereafter referred to as the premises) on the second floor of Wisma Damansara belonging to the plaintiff. Subsequently the Syarikat vacated the premises. The plaintiff brought this action in the Sessions Court and alleged that the Syarikat had taken up tenancy of the premises for a term of three years from 1 January 1977 to 31 December 1979 and that the Syarikat vacated the premises prematurely on 12 April 1978. The plaintiff claimed for:

(i) the sum of RM7,072 for arrears of rent for July 1977 to April 1978;

(ii) the sum of RM3,940 for arrears of service charges for July 1977 to April 1978;

(iii) the sum of RM3,309.60 as damages in respect of the loss of rent and service charges for May, June and July 1978, before another tenant started to rent the premises on 1 August 1978.

The President of the Sessions Court held that there was no binding contract between the parties which the plaintiff could enforce. Hence this appeal by the plaintiff.

In her amended statement of defence the defendant made the following alternative contentions:

(a) It was agreed by the plaintiff and the defendant that the defendant would occupy the premises as a monthly tenant.

(b) It was further agreed that all other terms and conditions would be subject to further negotiation.

(c) As the result of the breakdown in the negotiation the plaintiff made a fresh offer to the defendant by letter dated 24 December 1976 offering additional space on the lower ground floor at a revised rental. Therefore any terms and conditions offered by the plaintiff to the defendant prior to 24 December 1976 were revoked by the plaintiff's letter dated 24 December 1976.

(d) The Syarikat vacated and quitted the premises on 15 August 1977 with the full knowledge of the plaintiff, after giving the plaintiff notice to quit dated 6 August 1977.

(e) By allowing the premises to be occupied by various organizations on various occasions after the Syarikat had vacated the premises, the plaintiff had by conduct agreed to the termination of the tenancy agreement.

The defendant denied owing the plaintiff any sum of money.

In the matter of the proposed tenancy Messrs. Jones Lang Wootton (hereafter referred to as Wootton), chartered surveyors, valuers and property consultants, acted as agent for the plaintiff. In 1976 the defendant was occupying a space on the ground floor of Wisma Damansara as a tenant of the plaintiff and the defendant wished to move to the second floor. On 17 November 1976 Wootton wrote a letter (Exhibit P2) to the Syarikat, stating *inter alia* as follows:

> The landlords have now agreed to terminate your present tenancy on the ground floor on condition that you take up the tenancy of the area amounting to 788 squares feet to be vacated by Longman Malaysia Sdn. Bhd. at the end of this year. This tenancy is to commence on 1 January 1977 and will attract a rent of RM1.40 per square foot per month inclusive of service charge.
>
> Could you confirm that the above conditions are acceptable to you so that we can instruct the landlords' solicitors on your behalf to prepare the new tenancy agreement.

Written on the top of the letter were the words "SUBJECT TO CONTRACT". By letter dated 29 November 1976 (Exhibit P3) the Syarikat replied stating *inter alia* as follows:

> We... agreed to the conditions as stated in your letter. Kindly prepare whatever necessary agreement and forward it to us.

On 8 December 1976 Wootton wrote a letter (Exhibit P4) to the solicitors, Messrs. Skrine & Co., stating *inter alia* as follows and extending a carbon copy to the Syarikat:

> Would you kindly on behalf of the tenant prepare four copies of a fresh agreement incorporating the following particulars:

Area:	Approximately 788 sq ft on the 2 floor
Term:	Three (3) years commencing 1 January 1977 with option for 3 years at a revised rental to be agreed by the landlord.
Rent:	RM709.20 per month
Service Charge:	RM394 per month
Electricity deposit:	RM111.90
Security deposit:	RM3,309
Additional airconditioning:	RM0.082 cents
Conditions:	As in the standard agreement
Use:	Office premises.

At the hearing of this appeal Counsel for the respondent (defendant) confirmed that the defendant received the carbon copy. On 29 December 1976 Messrs. Skrine & Co. wrote a letter (Exhibit P6) to the Syarikat sending four copies of tenancy agreement and asking that the agreement be signed and then be returned for execution by the plaintiff. At the trial this agreement was not produced. It is true that the offer of tenancy in Exhibit P2 was made expressly subject to contract being entered into, but subsequent conduct of the defendant showed that there was a contract the terms of which the defendant accepted, and there is no evidence of breakdown of negotiation as alleged by the defendant. On 1 January 1977 the defendant moved into the premises. Before moving into the premises the defendant must have known all the plaintiff's terms for the tenancy because the terms were stated in P2, P4 and the written agreement sent by Messrs. Skrine & Co. If the defendant did not agree to any one of the terms she should have informed Messrs. Skrine & Co., Wootton or the plaintiff, before going into occupation of the premises, but there is no evidence to show that she informed them that she did not agree to any of the terms. On 4 July 1977 Wootton wrote to the Syarikat a letter (Exhibit P7) reminding the Syarikat that the agreement had not been signed on its behalf. Again there was no reply from the Syarikat to protest against the plaintiff's terms. The silence on the part of the defendant together with her conduct in going into occupation must be taken to be acceptance by her of the plaintiff's terms. The defendant

has not even suggested any reason why the Syarikat went into occupation if it was true that the occupation was not pursuant to the written agreement prepared by Skrine & Co. The occupation was unequivocally referable to the written agreement, and therefore under the doctrine of part performance the written agreement is an enforceable contract. There is not much evidence to show that the defendant negotiated for a monthly tenancy. The defendant's husband (DW4) only testified as follows:

> In 1976 our office was on lower ground floor of Wisma Damansara. We moved to the ground floor because we wanted bigger space. I negotiated the change of the premises with Mr. Gan. I told him that I wanted the place on month-to-month basis because we needed more space. Mr. Gan said he could not promise that but he would refer that request to his head office.

DW4 did not state clearly whether he negotiated for a monthly tenancy after the defendant received P4 in which the proposed three years tenancy was mentioned. It might well be that DW4 discussed with Mr. Gan about monthly tenancy when they discussed about the change from the lower ground floor to the second floor and before P4 was written. In any event the defendant moved into the premises knowing that the plaintiff's term was a tenancy of three years, and as I have already stated this conduct of the defendant was implied acceptance of three years tenancy. Therefore there was a contract of tenancy binding upon the defendant and the plaintiff, the terms of which are contained in P2, P4 and the written agreement put up by Messrs. Skrine & Co. One of these terms was that defendant took tenancy of the premises for a period of three years.

On 24 December 1976 Wootton wrote to the Syarikat a letter (Exhibit D11) in which Wootton offered the lease of 636 square feet of office space in the lower ground floor of Wisma Damansara to the Syarikat at RM1.70 per square foot. It was submitted on behalf of the defendant that this offer was made as the result of the alleged breakdown of the negotiation relating to the terms for the lease of the premises on the second floor. But nothing was stated in D11 about breakdown. It would be reasonable to infer that the offer in D11 was made as the result of the alleged breakdown if monthly tenancy was offered, but it was not stated in D11 whether the tenancy offered was monthly tenancy or a tenancy for a fixed period. That the offer in D11 was made not as the result of the alleged breakdown is evident from the fact that soon after D11 Skrine & Co. sent to the Syarikat on 29 December 1976 tenancy agreement in respect of the premises on the second floor.

On 6 August 1977 the Syarikat wrote a letter (Exhibit P8) to Wootton stating *inter alia* as follows:

> Due to unforeseen circumstances we are forced to surrender the ... tenancy with immediate effect. Please let me have all the bills which are due to us.

On 12 August 1977 Wootton sent a reply (Exhibit P9) to the Syarikat and pointed out that the tenancy was for the duration of three years and informed the Syarikat that the plaintiff would agree to premature termination of the tenancy if a suitable tenant could be found in place of the Syarikat. In my judgment the defendant was not a tenant at will as suggested by her learned Counsel, and she had no right to terminate the tenancy on any date she liked. Therefore the tenancy did not come to an end on 6 August 1977 but continued after that.

On about 9 April 1978 the defendant returned the keys of the premises to Wootton. On 12 April 1978 the Red Crescent used the premises with the permission of Wootton. As from 1 August 1978 another tenant rented the premises. There is no evidence to show that when Wootton accepted the keys from the defendant it did so under protest or expressly without

prejudice to the plaintiff's right to rent and service charges for period after 9 April 1978. Therefore in my judgment Wootton's acceptance of the keys implied that the plaintiff accepted termination of the tenancy as from 9 April 1978, i.e., the date of acceptance of the keys. This seems to be confirmed by the fact that the Red Crescent was allowed to use the premises on 12 April 1978. There is no evidence to show that the purpose of allowing the Red Crescent to use the premises was in order to mitigate damage. It appears that no rent was collected from Red Crescent. The defendant sought to show that the Red Crescent had used the premises on previous occasions and for this purpose DW3 was called to testify. He testified that he donated blood to the Red Crescent at Wisma Damansara on 28 October 1975 and on 12 October 1977. It is not clear form his evidence whether he donated blood at the premises on 12 October 1977. He stated: "I donated the blood on occasion on the second floor, just next door to my company. That space was previously occupied by Syarikat Seng Teik." It is not clear what he meant by "on occasion", whether he meant on 28 October 1975 or on 12 October 1977. If he donated blood at the premises on 28 October 1975 it would be irrelevant since the defendant moved into the premises on 1 January 1977. Evidence shows that the Red Crescent also used other premises in Wisma Damansara for blood donation. Another witness (DW2) testified that he was certain that the Red Crescent used the premises in 1977, a few months after the defendant had vacated the premises in August 1977. Even if it was true that the Red Crescent used the premises it must have done so with the knowledge and consent of the defendant as she was then holding the keys to the premises and Wootton did not have the keys. Since the defendant continued to hold the keys after that until about 9 April 1978, her tenancy was not affected by the Red Crescent's use of the premises. Therefore the defendant should pay rent of the premises for the period up to 8 April 1978. There was no damage suffered by the plaintiff from 9 April 1978 onwards, as by implication the plaintiff had agreed to the termination of the tenancy as from 9 April 1978.

P9 shows that rent and service charges had not been paid for period from July 1977. This seems to be confirmed by D15 which is dated October 1977 and shows total balance due RM6,627.99, made up as follows:

Rent for October to December 1977 payable in advance:	RM2,127.60
Service charges for October to December 1977 payable in advance:	1,182.00
Rent already outstanding:	2,127.60
Service charges already out-standing:	1,182.00
Cost of electricity already outstanding:	8.79
Total:	6,627.99

The amounts of rent and service charges already outstanding are equivalent to amounts for three months, and it is reasonable to assume that the amounts of rent and service charges already outstanding were in respect of July to September 1977. The defendant did not produce any receipt or other evidence to show that rent and service charges had been paid for any period from July 1977. For period from 1 July 1977 to 8 April 1978 the total amount of rent and service charges is RM10,223. In the statement of defence the defendant does not make any counterclaim or a claim for set-off. When giving evidence the defendant's husband (DW4) stated to the effect that the defendant had paid the plaintiff RM3,421.50 in deposits. But no receipt or other evidence was produced to show that the deposits were that much. Counsel

for the plaintiff informed the Court that the plaintiff is prepared to allow RM1,893.94 as set-off in respect of deposits. Therefore the net amount owed by the defendant for rent and service charges after deducting RM1,893.94 should be RM8,329.06.

It was submitted on behalf of the defendant that the plaintiff had failed to mitigate damages in that it did not make any effort to get a new tenant until about May or June 1978 when advertisement was inserted in the newspapers, although the premises had been vacated in August 1977. But it should be noted that the defendant returned the keys only in April 1978, and I do not see how the plaintiff could lease the premises to another tenant without giving the new tenant the keys of the premises. Also it was not advisable to lease the premises to another tenant unless the keys given to the defendant were recovered so that they could not be used by someone to have access into the premises when the new tenant is occupying it.

I allow the appeal and order that judgment should be entered for the plaintiff in the said sum of RM8,329.06. The plaintiff should also have costs in this Court and in the Sessions Court.

Also found at [1984] 2 CLJ 38

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